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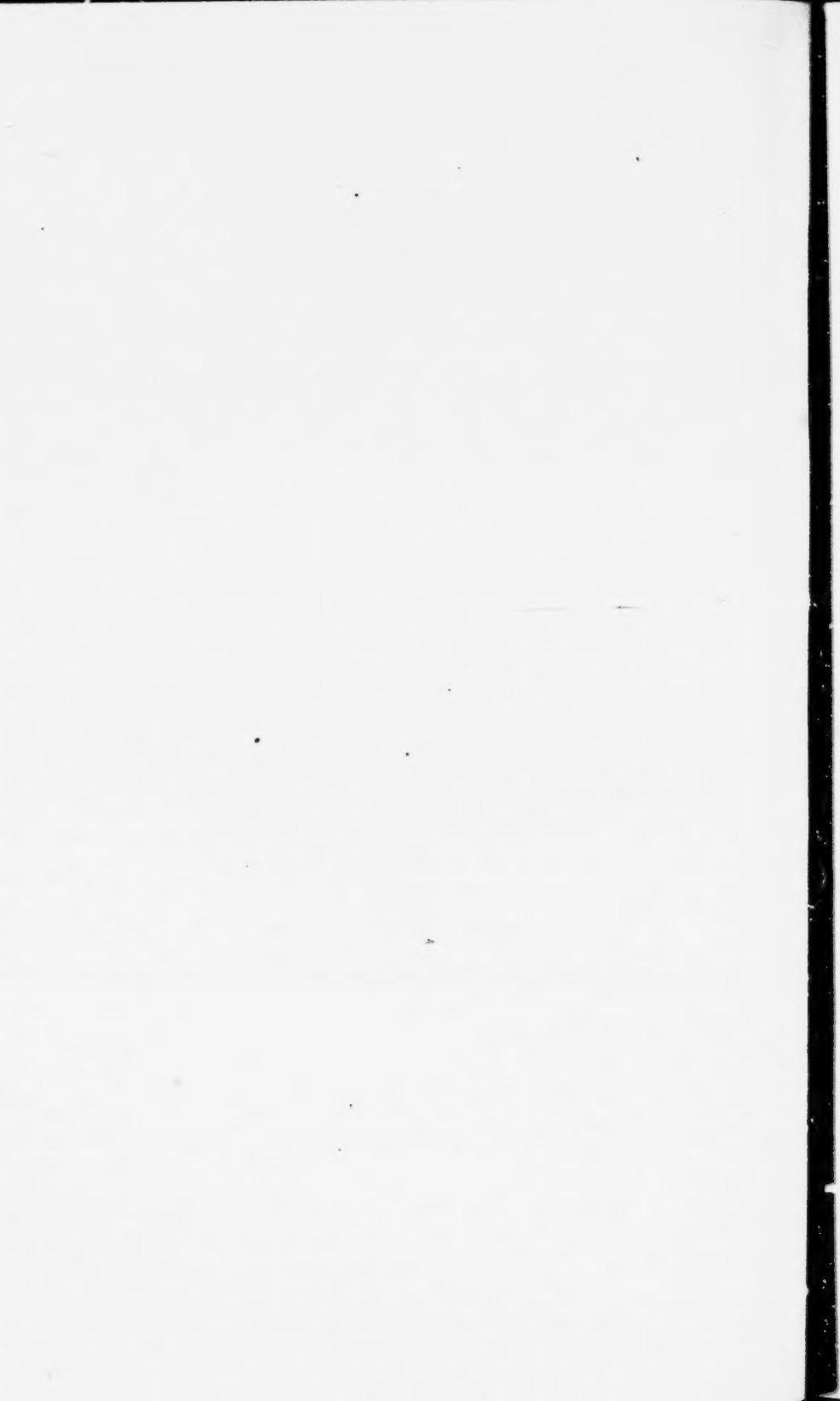
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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 762

HOMER LESTER BARTCHY, ALIAS HOMER BROOKS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 235-237)* and dissenting (R. 238-244) opinions in the circuit court of appeals are not yet reported. The district court's memorandum opinion overruling petitioner's demurrer to the indictment and setting forth the court's findings upon the evidence appears at pages 13-16 of the record.

*The record references are to the typewritten transcript on file with the Clerk. Petitioner has moved to dispense with the printing of the record, and although his motion has not yet been acted upon, the record has not been printed.

JURISDICTION

The judgment of the circuit court of appeals was entered December 23, 1942 (R. 245), and a petition for rehearing was denied January 26, 1943 (R. 252). The petition for a writ of certiorari was filed February 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED¹

1. Whether the finding and judgment of the district court that petitioner knowingly failed and neglected to keep his local draft board advised of the address where mail would reach him, in violation of Section 11 of the Selective Training and Service Act of 1940 and Section 641.3 of the Selective Service Regulations (2d ed.), is supported by the evidence.

2. Whether a violation of Section 641.3 constitutes a punishable offense under Section 11 of the Act.

¹ The general allegations that the indictment is insufficient and indefinite (Pet. 10, 11), without indicating in what respects, do not raise any specific question or present any issues which would warrant the granting of the writ. As against the charge of indefiniteness, it is significant that petitioner did not request a bill of particulars and that the record as a whole demonstrates that he was fully aware of the offense with which he was charged.

3. Whether petitioner had a right to "purge" himself of his delinquency.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894, 50 U. S. C. 311, and of the Selective Service Regulations are set forth in the Appendix, *infra*, pp. 16-20.

STATEMENT

Petitioner, a registrant under the Selective Training and Service Act of 1940, was indicted on March 16, 1942, in the District Court for the Southern District of Texas on two counts charging, first, that he knowingly failed and neglected to comply with a notice ordering him to report for induction (R. 4-5), and, second, that he knowingly failed and neglected to keep his local draft board advised at all times of the address where mail would reach him (R. 5-6). He pleaded not guilty and, at his request and with the approval of the court and the United States Attorney, was tried by the court without a jury (R. 10-11). On April 18, 1942, the court found petitioner not guilty on count one but guilty on count two, and sentenced him to imprisonment in an institution

of the jail type for sixty days (R. 12).² He was admitted to bail pending appeal (R. 20-21). The court below, with one judge dissenting, affirmed the conviction (R. 245).

The evidence in support of the conviction may be summarized thus:

Petitioner, who had been duly registered with the Harris County, Texas, Selective Service Board No. 9 (R. 28-41), was classified 1-A on January 20, 1942 (R. 41-42). He took his Army physical examination on February 3 (R. 43, 46-48). A day or two later he inquired of the clerk of the board how long it would be before he would be inducted, and was advised that 25 to 30 days customarily elapsed between the Army physical examination and induction (R. 52). At that time the board's records, pursuant to a letter from petitioner dated December 12, 1941, showed his address to be 7543 Harrisburg Boulevard, Houston, Texas (R. 49, 50).

On February 10, 1942, the board received a letter from petitioner dated the same day, in which he stated that "In accordance with your regulations I am notifying you that I have today shipped as a seaman aboard the SS Caliche." He also stated that he preferred service "in the merchant marine to any other branch of the service"

² Petitioner's statement (Pet. 1) that he was convicted of failure to report for induction is incorrect.

and asked that he be given a deferred classification as a seaman. His letter concluded thus:

In the event you do not consider my service as an active seaman deferable you may communicate with me at my new mailing address, 8045 Harrisburg Blvd., care National Maritime Union. The trip I am shipping on will not last more than two weeks and since I have not received from you yet either the final report on my physical examination or an order giving me the date of the induction and since I was told by your board that I would have from 25 to 30 days after my physical examination (most probably), I believe that in the event you decide to induct me into the Army that I shall be back in Houston before the effective date of the induction.

Please send your decision to me at 8045 Harrisburg Blvd., Houston. (R. 54.)

Prior to this, petitioner had never been a seaman (R. 206), and he was not at the time a member of the National Maritime Union, although the union had issued him a "trip card" for the voyage (R. 132).

On the same date, February 10, the board received a telegram from petitioner in which he stated that he was aboard the *S. S. Pan Maine* (R. 55-57). This telegram was the last communication the board received from petitioner concerning his whereabouts (R. 83). As a matter of fact, however, petitioner sailed on the *S. S. Pan Rhode*

Island, which left Texas City, Texas, for New York City on February 11 (R. 191, 209, 210, 213).

On February 20 the board mailed to petitioner at 7543 Harrisburg Boulevard, Houston, Texas, a notice to report for induction on March 4 (R. 57-58, 61). The notice was mailed to this address rather than to the Houston office of the National Maritime Union, 8045 Harrisburg Boulevard, because the board did not consider that petitioner's letter of February 10 (*supra*, p. 4) constituted a notification of a change in address (R. 81).³ Nevertheless, the notice reached the Houston office of the union on February 20 or 21 (R. 119, 127-129)⁴ and, in accordance with instructions left there by petitioner (R. 123, 125, 142-143), was forwarded to the office of the union in New York

³ The clerk of the board testified that petitioner's letter was regarded as in the nature of a request for deferment rather than as a notification of change of address (R. 81, 82). He said that "As a rule, with a notice of change of address, we only accept those when he says to change my address to such and such a thing (R. 81.)"

⁴ Petitioner's repeated assertion (Pet. 2, 6, 11, 12) that the notice of induction failed to reach him because the board mailed it to 7543 Harrisburg Boulevard rather than to No. 8045 is negated by the record. Wells, the union's dispatcher at the Houston office at No. 8045 (R. 117), testified that the notice was received at that address around the 20th of February (R. 129), which was the date on which it was mailed by the board (R. 57, 61). The failure of the board's clerk to mail it to the address given in petitioner's letter of February 10 was thus obviously of no consequence. Cf. *United States ex rel. Bergdoll v. Drum*, 107 F. (2d) 897 (C. C. A. 2), certiorari denied, 310 U. S. 648.

City (R. 119, 120). On March 12, the notice was returned to the board (R. 58, 61, 62).

Meanwhile, upon petitioner's failure to report for induction on March 4, the clerk of the board telephoned one Drake, a dispatcher at the Houston office of the union, and "made inquiry about Bartchy" (R. 63-64). Drake told the clerk that petitioner had shipped from Houston on the *Pan Rhode Island* and that petitioner had since then written to Drake, stating that he had quit that ship and was going to sail in the war zone (R. 64).⁵ Drake referred the clerk to one Merrell of the New York office of the union for further information (R. 64). On March 7, the board wrote to Merrell, asking that he inform them "of the name of the vessel on which Mr. Bartchy shipped, its probable return date, and port on return to the United States" (R. 84, 87).⁶

On March 10, the board, pursuant to Section 642.1 (b) of the Selective Service Regulations (*infra*, p. 17), mailed a notice of delinquency, dated March 9, to petitioner at the Houston office of the union (R. 68-72),⁷ stating that he was

⁵ This was the first information the board had that petitioner had shipped on the *Pan Rhode Island* (R. 83).

⁶ Merrell replied to the board's letter under date of March 12 (R. 88-89), one day after petitioner had been taken into custody (see p. 10, *infra*).

⁷ This notice was mailed to the union's address as a result of the information which the board had obtained from Drake of the Houston office (see p. 6, *supra*), and not in consequence of petitioner's letter to the board of February 10 (R. 69, 80).

delinquent for failing to report for induction and ordering him to report to the board on or before March 16 (R. 72). The notice was received at the Houston office of the union about March 11 (R. 143), but was not forwarded because it was known that petitioner had in the meantime been taken into custody in New York (R. 143). (See p. 8, *infra*.) Petitioner returned to Houston on April 2 and received the notice about three days later (R. 198).

On the same day (March 9) that it executed the notice of delinquency, the board, on Form 279 provided for by Section 642.4 (b) of the Selective Service Regulations (*infra*, pp. 18-19), reported petitioner to the United States Attorney as delinquent for failure to report for induction on March 4 (R. 101-105). The board stated in its report that "The delinquent has been located by F. B. I., Houston, Texas, * * * March 9, 1942, at New York, New York" (R. 103). On March 11, after agents of the Federal Bureau of Investigation had inquired at the New York office of the union as to petitioner's whereabouts, petitioner appeared at the office and was taken into custody by the agents (R. 147-148, 170, 212).

In his own defense, petitioner testified that he instructed the Houston office of the union to forward his mail to the New York office (R. 198-199, 205). When he arrived at New York on February 20, he secured his discharge from the *Pan*

Rhode Island, because he found that the vessel was going to return to Houston before he could finish his business in New York (R. 191-192).^{*} Also on February 20, petitioner went to the New York office of the union and inquired of Merrell, the union's port agent (R. 161), whether there was any mail for him; Merrell replied in the negative (R. 192). During the course of this conversation petitioner told Merrell that he was expecting a communication from his draft board concerning his request for deferment (R. 192). On February 25, having received no word from the board, petitioner took employment on the *American Packard*, which was docked at Hoboken, New Jersey in New York Harbor (R. 193-194). He knew that this ship was scheduled for a foreign voyage (R. 206, 214) and that it would not be likely to sail for at least two weeks (R. 197, 206). Petitioner remained aboard the *American Packard* practically all of the time between February 25 and March 11, the date he was taken into custody (R. 193, 207-208). During this period he did not receive any information that he had been sent a notice of induction (R. 199, 211). He did not notify the board or, so far as ap-

^{*} Petitioner explained that he sailed on the *Pan Rhode Island* rather than the *Caliche* because he found at the last minute that the latter was going on a three months' voyage (R. 208-209). When he went aboard the *Pan Rhode Island*, he thought that it was the *Pan Maine* (R. 210).

pears, anyone else, including Merrell, that he was aboard the *American Packard*, or attempt to get in touch with Merrell during the two-weeks' period (R. 163, 168, 178-179, 181-182, 187, 203, 216).

Merrell, called as a witness for the defense (R. 161), testified that petitioner came to him after the *Pan Rhode Island* reached New York and stated that he expected to be inducted (R. 162) and that he wanted to be notified as soon as the induction notice reached the union office (R. 168, 177-178). When petitioner's induction papers reached the union office, Merrell checked the records and found that petitioner had signed aboard the *American Packard* several days previously and that that ship had been scheduled for a foreign voyage. Merrell assumed that the ship had sailed and, consequently, he sent the induction papers back to the Houston office of the union with a letter stating that petitioner had left on a vessel bound on a secret voyage which would last several months (R. 163, 166-167, 178-179, 181-182, 187). Merrell did not see petitioner from about February 25 until petitioner was taken into custody by agents of the Federal Bureau of Investigation on March 11 (R. 168, 187).

ARGUMENT

1. The Selective Service Regulations provide (2d ed., sec. 641.3, 6 F. R. 6851-6852 *infra*, p. 8) that it "shall be the duty of each registrant to keep

his local board advised at all times of the address where mail will reach him." Section 11 of the Selective Service and Training Act establishes criminal penalties for any person "who in any manner shall knowingly fail or neglect to perform any duty required of him under * * * rules or regulations made pursuant to this Act."

Petitioner contends that the proof was insufficient to support a conviction for violation of the above regulation. The evidence shows that petitioner knew he would receive a notice to report for induction in Houston, Texas, within twenty-five to thirty days after February 3, 1942 (R. 52, 189-190). On February 11th, he shipped as a seaman for New York (R. 191, 209-210, 213). On February 10th, he wrote the draft board (R. 54, 189, 202-203) giving a new address in Houston, and stating that he preferred to serve in the Merchant Marine rather than the Army (although he had never been a seaman before (R. 206)). He left with the Houston address a forwarding address in New York, the office of the National Maritime Union (R. 119, 199, 205). On arrival in New York on February 20th, he inquired of Merrell at the union office whether there was any mail for him (R. 176, 192), and stated that he was expecting a communication from his draft board (R. 192).

On February 25th, he took employment on the *American Packard* (R. 193-194), which he knew

was going on a foreign voyage (R. 197, 206, 214), and remained on that vessel in New York harbor for two weeks without notifying Merrell that he was there or that the vessel was remaining in port for two weeks (R. 168, 187, 193-194, 199, 207-208, 211). In the meantime, while he was on the *American Packard*, his notice to report for induction arrived at the New York union office, but was returned to Houston when it was learned that the petitioner was on the *American Packard*, since it was thought that the vessel had already sailed (R. 163, 166-167, 178-179, 181-182, 187).

If we assume that the giving of a forwarding address is sufficient compliance with the regulation, the issue as to the sufficiency of the evidence to support petitioner's conviction is reduced to the question whether and to what extent a person who relies on such an arrangement is under an obligation to keep in touch with the address to which the mail is to be forwarded. How often that address should be apprised of a person's whereabouts will vary with the circumstances.

In this connection it should be noted that the Selective Service Act cannot function successfully if registrants do not apprise their boards where they can be reached. As the trial court observed (R. 16), "The Act and Regulations thereunder require great diligence and promptness upon the part of registrants in complying with the Act, Regulations, and Orders of the Board, and par-

ticularly great diligence in keeping the Draft Board advised of his whereabouts as required by Regulation, Part 641.3."

Here petitioner knew that a notice to report for induction was likely to arrive any day, and yet he remained on the *American Packard* for two weeks during this crucial period without communicating his address either to Merrell or to the Board in Texas. That petitioner was not overly concerned with making certain that his notice would reach him is indicated by petitioner's prompt joining of the Merchant Marine when induction into the Army became imminent and his leaving Houston and taking employment on a vessel due to leave New York for a long foreign voyage during that period.

On this evidence it would seem that the tryer of the facts, who heard the testimony, could reasonably have come to the conclusion that petitioner had failed to conform to the standard of diligence required by the Regulation. It was for the trial court, sitting without, and therefore in place of, a jury, to draw the inferences from the facts, and its conclusions are to be accepted as reasonable if based upon the evidence.⁹

⁹ *Fraina v. United States*, 255 Fed. 28, 34-35 (C. C. A. 2); *Rendleman v. United States*, 38 F. (2d) 779, 780 (C. C. A. 9); cf. *Goldman v. United States*, 245 U. S. 474, 477; *National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105.

2. In his dissenting opinion Judge Hutcheson took the position that a failure to comply⁷ with the first sentence of Section 641.3, *infra*, p. 16, was not a violation of Section 11 of the Selective Service Act. We think the language of the Regulation making it "the duty of each registrant to keep his local board advised" is inconsistent with such a view. Petitioner does not argue to the contrary in his petition.

3. Petitioner contends (Pet. 2, 7, 10, 11, 13, 14) that under the regulations he had a legal right to "purge" himself of his delinquency and that this right was denied to him.¹⁰ It is clear, however, that the regulations upon which petitioner relies confer no such right.

Petitioner's argument is predicated upon Sections 642.1-642.5 of the Selective Service Regulations (*infra*, pp. 16-20). They merely describe the procedure which a board shall follow in cases

¹⁰ The record does not support petitioner's assertion that he "presented himself for induction in order that he may stand purged of any alleged delinquency" (Pet. 2; cf. Pet. 11). Petitioner evidently has reference to the fact that he surrendered to agents of the Federal Bureau of Investigation in New York City after he had been notified that they were looking for him (R. 153-154, 212). Regulations 643.1 and 643.2 do provide, however, that any person convicted of violating the Selective Service Act or any Regulation thereunder shall at any time after conviction be eligible for parole, for military service, or for work of national importance under civilian direction. Such a parole may be granted by the Attorney General upon the recommendation of the Director of Selective Service.

where delinquency is suspected.¹¹ The procedure prescribed by the regulations for the reporting of violations to the United States Attorney does not constitute an element of the offense and the board has no power to absolve the registrant of the consequences of any offense committed.

CONCLUSION

Although the case is not altogether free from doubt, as Judge Hutcheson's opinion indicates, we believe that on the whole record the trial court was warranted in reaching the verdict it did on

¹¹ These sections provide that the local board shall mail a notice of delinquency to a registrant who it "has reason to believe * * * has become a delinquent" (Sec. 642.1 (a)) and that the board shall, after mailing the notice, wait five days before taking further action (Sec. 642.2 (a)). If the board does not hear from a *suspected* delinquent within five days, it shall take certain designated steps to locate him (Sec. 642.2 (b) (c) (d)). Section 642.3 provides that if the *suspected* delinquent is located as a result of the board's efforts, or if he reports voluntarily, the board shall carefully investigate the delinquency, and, if it concludes that he is innocent of any wrongful intent, it shall proceed with his case as if he were never suspected of being a delinquent. Section 642.4 provides that if the board is convinced that a delinquent "is not innocent of wrongful intent," or is unable to locate a *suspected* delinquent, it shall report him to the United States Attorney for prosecution. Section 642.5 governs the procedure of the board when a delinquent reported by it to the United States Attorney later offers to comply with the law, but it expressly provides that the decision "whether such a delinquent should be prosecuted * * * rests entirely with the United States district attorney."

the facts, and in coming to the conclusion that the Regulation required, under the peculiar circumstances of this case, a larger display of diligence.

It is accordingly respectfully submitted that, the decision below being correct, and no conflict of decisions existing, certiorari should be denied.

Respectfully submitted.

✓ CHARLES FAHY,
Solicitor General.

✓ WENDELL BERGE,
Assistant Attorney General.

ROBERT S. ERDAHL,
W. V. T. JUSTIS,
Attorneys.

MARCH 1943.

APPENDIX

Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894, 50 U. S. C. 311, as amended, provides in part as follows:

* * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment * * *.

The pertinent provisions of the Selective Service Regulations (2d ed.) are as follows:

SEC. 641.3 *Communication by mail.* It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not. [6 F. R. 6851-6852.]

SEC. 642.1. *Mailing notice of delinquency.*

(a) When a local board has reason to believe that a nonregistrant under its jurisdiction is a delinquent or that a regis-

trant under its jurisdiction has become a delinquent, the board shall prepare, in quadruplicate, a Notice of Delinquency (Form 281).

(b) The local board shall mail the original of the Notice of Delinquency (Form 281) to the suspected delinquent at his last-known address. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall file the fourth copy with the date of mailing noted thereon.

(c) If the suspected delinquent is a registrant under the jurisdiction of the local board, the local board shall note in the "Remarks" column of the Classification Record (Form 100) the fact that the notice was mailed and file the fourth copy of the Notice of Delinquency (Form 281) in the registrant's Cover Sheet (Form 53). [7 F. R. 110.]

SEC. 642.2 *Investigation of delinquency.*

(a) After mailing the Notice of Delinquency (Form 281), the local board shall wait 5 days before taking further action.

(b) If it does not hear from the suspected delinquent during the 5-day period, the local board shall take the following steps:

(1) Communicate with the person "who will always know" the registrant's address whose name and address appear on lines 7 and 8 of the Registration Card (Form 1).

(2) Communicate with the "employer" whose name and address appear on lines 10 and 11 of the Registration Card (Form 1).

(c) If as a result of these contacts the local board acquires any information which will enable it, with a reasonable amount of effort, to locate the suspected delinquent, it should make that effort.

(d) In trying to locate the suspected delinquent the local board may use the voluntary assistance of local or State police officials, as well as the press and radio. In no event, however, will the local board order or participate in the arrest of a suspected delinquent. [7 F. R. 110.]

SEC. 642.3 *Disposition of delinquencies.*

If a suspected delinquent has been located as a result of the local board's efforts under § 642.2 or a suspected delinquent has reported voluntarily to a local board, the local board shall carefully investigate the delinquency. If the board finds that the suspected delinquent is innocent of any wrongful intent, the local board shall proceed to consider his case just as if he were never suspected of being a delinquent. The local board shall report its decision to the State Director of Selective Service and shall note its decision in its records. [7 F. R. 111.]

SEC. 642.4 *Reporting delinquents to United States district attorney.* (a) If the local board is convinced that a delinquent is not innocent of wrongful intent or if it is unable to locate a suspected delinquent (§ 642.2), the local board shall report him to a United States district attorney for prosecution under section 11 of the Selective Training and Service Act of 1940, as amended.

(b) In reporting a delinquent to a United States district attorney, the local board shall fill out a Report of Delinquents to United States District Attorney (Form 279), in quadruplicate. The local board shall mail the original to the United States district attorney. It shall mail a copy to the State Director of Selective Service. It shall post a copy in a conspicuous place for public inspection, and, whenever practicable, it shall give the information contained thereon to the press and radio and shall encourage them to give such information the widest possible publicity. It shall note the date of mailing on the fourth copy and shall place it in the registrant's cover sheet (Form 53), if the delinquent is a registrant, or in an alphabetical file of nonregistrant delinquents, if the delinquent is not a registrant.

(c) If the delinquent is a registrant, the local board shall note its action in the "Remarks column of the Classification Record (Form 100). [7 F. R. 111.]

SEC. 642.5 *Local board action subsequent to reporting a delinquent to United States district attorney.* When a delinquent who has been reported to a United States district attorney later offers to comply with the law, the United States district attorney should be immediately notified and given a complete statement of the facts concerning such offer of compliance. The decision of whether such a delinquent should be prosecuted or his prosecution continued, in case it has already been undertaken, rests entirely with the United States district attorney. The local board,

when requested to do so by the United States district attorney, may offer a suggestion as to the advisability of discontinuing the prosecution of a delinquent who has complied or is willing to comply with the law. If it is determined that the delinquency is not wilful, or that substantial justice will result, the local board should encourage the delinquent to comply with his obligations under the law and, if he does so or offers to do so, should urge that any charge of delinquency against him or any prosecution of him for delinquency be dropped. [7 F. R. 111.]